IN THE COURT OF APPEALS OF IOWA

No. 3-1175 / 13-0772
Filed January 9, 2014

IN RE THE MARRIAGE OF LOUIS LERETTE III AND MALISSA LERETTE

Upon the Petition of
LOUIS LERETTE III,
Petitioner-Appellant,

And Concerning
MALISSA LERETTE,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

A husband appeals the physical care, child support, and property division provisions of the decree dissolving his marriage. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Stephen C. Ebke of Porter, Tauke & Ebke, Council Bluffs, for appellant.

Marti S. Sleister, Council Bluffs, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

MULLINS, J.

Louis Lerette appeals the decree dissolving his marriage to Malissa Lerette. Louis claims on appeal the district court should have ordered the parties to have shared care of their minor daughter instead of placing physical care with Malissa. He also claims the court erred in calculating his annual income and failed to take into account the child support payments he makes for his other child. He also asks for a cash settlement to equalize the property division ordered by the court. For the reasons stated below, we affirm the district court's decree on the physical care and property division provisions but reverse it on the child support amount. We remand the case for recalculation of the child support obligation owed by Louis.

I. BACKGROUND FACTS AND PROCEEDINGS.

Louis and Malissa were married in September of 2011. Prior to their marriage the parties had one daughter, who was born in August 2008. The child was four years old at the time of the trial. Louis also has another daughter, who was three at the time of the dissolution trial. He pays $500.00 per month in child support for this child.

Malissa was thirty-one years old at the time of trial and employed as a registered nurse. She had recently reduced her hours from full time to a "casual" basis to spend more time with the parties' child. The district court imputed full-time work to Malissa in its calculation of child support, and Malissa does not appeal this ruling.

Louis was thirty-three years old at the time of trial and self-employed doing custom woodworking, specifically installing custom cabinets. He has no other employees, but he does pay other individuals as independent contractors to perform work for his company. From the family's 2011 tax return, Louis showed a gross income of $121,386; however, after deductions and expenses, he reported a business income of $9650. For the purposes of child support guideline calculations, Louis contended he earns a gross income of approximately $30,000 annually. The district court disagreed, finding his annual income to be $55,000.

After hearing from the parties, their family members, and a private investigator hired by Malissa's mother, the court issued its decree, granting the parties joint legal custody of their daughter and placing physical care with Malissa. Louis was provided visitation every other weekend from Friday evening until Monday morning and three hours every Tuesday and Thursday. The court also ordered the parties to alternate holiday visitation and provided Louis with four weeks of uninterrupted visitation in the summer. The monthly vhild support was initially set at $527.23; however, after a posttrial motion the support amount increased to $634.18 based on Malissa's payment of day care expenses and health insurance for the child, and Louis's payment of child support for his other daughter.

The court ordered the marital home to be sold, the debt to be repaid including any outstanding tax debt, and the proceeds, if any, divided equally

between the parties. It awarded all of the vehicles[1] to Louis along with the debt associated with them. It awarded Malissa her retirement. Finally, all other personal property was awarded to the person who currently possessed it, including bank accounts. The court did not order a property equalization payment.

From this decree, Louis appeals.

II. SCOPE AND STANDARD OF REVIEW.

We review cases tried in equity, such as dissolution cases, de novo. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 483–84 (Iowa 2012). Although we decide the issues raised anew, we give deference to the district court's findings, especially those involving credibility of witnesses. *Id*. at 484.

III. SHARED CARE.

Louis contends the parties should have been granted joint physical care of their daughter. The temporary order permitting joint physical care on an alternating weekly basis had been in place for seven months before the case went to trial, and Louis contends it should have continued with minor modifications. Louis faults Malissa for the lack of communication and asserts there is no evidence to show he is deficient in the care of his daughter.

The district court noted the lack of communication and inability to agree on some basic decisions to be made about the child as the reasons joint physical care in this case could not work. "Face-to-face communication to work things out does not seem to be something these two people are capable of." The district

[1] All of the vehicles were titled in Louis's company's name.

court noted the communication that does exist between the parties is strictly text messaging and the text messaging actually shows how they are not able to communicate, according to the district court.

Malissa accused Louis of several instances of domestic abuse, which occurred prior to the marriage, and she takes issue with the amount of time Louis spends racing cars and drinking with his friends and family. Louis accused Malissa of drinking to excess and being emotionally unstable. Malissa's mother even hired a private investigator during the pendency of the matter to conduct surveillance on Louis while he was racing. The district court found that the allegations of domestic abuse, to the extent they were true, did not affect the custody or visitation determination in the case. The district court was hopeful the tension and animosity between the parties would subside once a final determination by the court was issued.

Upon our de novo review of the record, and giving deference to the trial court's observations of the parties during trial and its assessment of the credibility of the witnesses, we agree with the district court's finding that joint physical care in this case is not workable. When determining whether a joint physical care arrangement is in the best interests of a child, a court should consider the following factors:

> (1) "approximation"—what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters."

In re Marriage of Berning, 745 N.W.2d 90, 92 (Iowa 2007). While in the seven months preceding the trial the child was being cared for by both parties equally, historically Malissa had been the child's caregiver. The parties have shown little to no respect to each other and could only communicate via text message. This does not engender a feeling of confidence that they will be able to communicate about the child in the future. While we are hopeful, like the district court, that the resolution of this case will calm tensions, we are also keenly aware that past behavior is often a good indicator of future behavior. *See In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992) ("[A] parent's past performance . . . may be indicative of the quality of the future care that parent is capable of providing.").

The degree of conflict between Malissa and Louis and between their extended families and friends was clearly on display during the trial as each side went out of their way to show the failings of the other party. Malissa accused Louis of injuring the child during the pendency of this case, which resulted in an unfounded investigation by the department of human services.

The record also reflects the parties cannot agree about their approach to caring for the child on a daily basis. There was disagreement between the parties about religious training for the child and what school she should attend. Malissa disagreed with Louis's use of his mother as a caregiver for the child when he races cars in the summer. Malissa asserted Louis should race less and spend more time with the child. Louis pointed to a report from a physician who evaluated the child and both parents. The report stated both parents to be of

equal competence to parent the child and meet her daily needs but noted Malissa "did appear to smother her daughter with a lot more attention than would be given to a typical 4-year-old."

Agreeing with the district court, we find the evidence in this case is not the kind that leads us to believe a joint physical care arrangement would be in the child's best interests. The physical care provisions of the district court's decree are affirmed.

IV. CHILD SUPPORT.

Next, Louis contends the district court erred in calculating the child support owed in this case. He argues the district court incorrectly imputed to him an annual income of $55,000; he asserts his income from his business is $30,000 annually. He also asserts the district court failed to take into account the $500 monthly child support obligation he has for his other daughter.

We begin by noting that while the district court's first child support order did not take into account Louis's prior support obligation, the posttrial order amending the amount of the child support did take that $500 monthly support obligation into account. Louis's assertion the district court failed to account for this support obligation is rejected.

The issue of Louis's annual income is slightly more complicated. As Louis is self-employed, we do not have a paystub or a W-2 to look at to determine his annual income. The evidence submitted to establish his income was less than

clear. The 2011 tax return[2] submitted indicated an annual net business income of $9650. Louis claims his annual income is approximately $30,000.

The court stated after its review of the schedule C that "Louis deducts from his gross income many things that a wage earner cannot deduct from their income . . . . He pays for almost everything out of his business account." The district court concluded that it would attribute to Louis an income for child support purposes of $55,000. It is unclear how the district court came up with this figure. There was very little testimony at trial as to how the deduction and expense amounts for Louis's business were calculated. The district court also did not indicate with which of the deductions and expenses it disagreed. Based on our de novo review of the record and giving weight to the findings of fact of the district court, we do not find sufficient evidence in the record to support the district court's estimation of Louis's income.

In April of 2012, the parties refinanced their home. In the loan application, submitted as evidence at trial, the parties listed Louis's monthly income as $2824.12. This amount annualizes to $33,889.44. The district court used this same loan application to attribute an annual income to Malissa of $43,000. These were representations the parties made jointly to the lender. We find the loan application can and should also be used to determine Louis's annual income, as it is the most reliable evidence of net income that is available in the record. We remand this case to the district court to recalculate the child support owed by Louis using an annual income of $33,889.44 for Louis and $43,000 for

[2] Louis had not yet completed his 2012 taxes by the time of the February 2013 hearing.

Malissa. Louis should still be given credit for the $500 monthly child support payment he makes for his other daughter, and Malissa should be given credit for the health insurance premiums and daycare expenses she pays.

V. PROPERTY DIVISION.

Finally, Louis contends it was an error for the district court to not award him a cash property settlement because the property awarded to him had a negative value of $13,057, while the property awarded to Malissa had a positive value of $5146. He asks that we amend the property division award to permit him a monetary award of $9151[3] to be paid out of the proceeds from the sale of the marital home to equalize the property division award.

Beside the parties' marital home, the only property to be divided was the vehicles, which were titled in the business's name, and Malissa's retirement saving plan. The market value of the vehicles was disputed at trial. Malissa asserted the 2011 Cadillac CTS was worth $40,000 while Louis believed the value to be $27,000 based on an appraisal offer he received from CarMax. The vehicle had an outstanding loan balance of $37,457. Therefore, Louis contends he owes approximately $10,000 more than the car is worth, while Malissa believes the vehicle has some value. The parties also recently purchased a 2012 Dodge Ram. Louis asserted the vehicle was worth $40,000 with an outstanding loan of $48,000 against it. Malissa stated the vehicle was worth $50,000, thus giving it a slightly positive value.

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[3] He argues his net negative $13,057 award and her net $5146 award results in a difference of $18,203, which should be equalized.

The district court did not reconcile the differing values of the vehicles in its decision. Malissa contends on appeal that to require her to make a property equalization payment out of the martial home proceeds would effectively permit Louis to shed the financial liability his company incurred in purchasing these vehicles while permitting him to retain the value.

While the vehicles were titled under Louis's company's name,[4] we note Malissa drove the Cadillac and was awarded the use of that vehicle, along with the debt obligation, in the temporary order. At trial she stated she did not want the vehicle because she could not afford it.

An "equitable division" of the property of a marriage does not necessarily mean an "equal division" of each asset. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa 2009). Our focus is on what is equitable under the circumstances. *Id.* We note there were very few significant assets resulting from this short-term marriage, except the marital home. We conclude the district court's property division in this case was equitable, and we decline Louis's request to order a property equalization payment to be made from the proceeds from the marital home.

VI. APPELLATE ATTORNEY FEES.

Malissa requests an award of attorney fees in the amount of approximately $6600.

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[4] We note that Louis's business name is Triple L Custom Woodworks, Inc. There is no evidence of a corporate tax return. Instead, Schedule C attached to the Form 1040 shows the business name, and Louis paid self-employment tax on the net income shown on Schedule C.

> Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. Factors to be considered in determining whether to award attorney fees include: "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal."

In re Marriage of Sullins, 715 N.W.2d 242, 255 (Iowa 2006) (quoting *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005)). Neither party was completely successful in this appeal, and considering our determination of Louis's annual income, we decline to award Malissa attorney fees in this appeal.

Costs on appeal are to be divided one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.